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*Cases:*

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IN THE

# Supreme Court of the United States

October Term, 1965

No. 673

MARTHA CARDONA,

*Appellant,*

*vs.*

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, Members of and constituting the Board of Elections of the City of New York,

and

LOUIS J. LEFKOWITZ, as Attorney General, appearing specially pursuant to Section 71 of the Executive Law.

## BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

The American Jewish Congress has sought and received consent of the parties to submit this brief *amicus curiae.*

### Statement

Appellant, Martha Cardona, is a native-born citizen of the United States who is literate in Spanish, the native language of her place of birth, Puerto Rico (R. 2). She voted regularly in gubernatorial, legislative and municipal

elections in Puerto Rico prior to coming to New York City in 1948 (R. 3). The facts set forth in her petition indicate that she had access to sufficient sources of information and has utilized such sources to become an informed and knowledgeable citizen (R. 3). Nonetheless, she and large numbers of her fellow citizens similarly situated, although they are literate in the language which they learned in their United States schools, are denied the right to vote in New York State pursuant to Article II, Section 1 of the New York State Constitution and Sections 150, 168 and 201(1) of the New York State Election Law. The constitutional provision reads, in part, as follows: "* * * after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote * * * unless such person is also able, except for physical disability, to read and write English."

Appellant's application for an order directing that the members of the Board of Elections of the City of New York register her as a duly qualified voter or, in the alternative, directing the Board to give appellant a literacy test in the Spanish language (R. 1) was denied by the Supreme Court of New York County (R. 37-38). The New York Court of Appeals, voting four to three, affirmed (R. 40-41).

## Questions to Which this Brief is Addressed

This brief *amicus* considers only the following questions:

1. Is the denial of the right to vote to native American citizens who, although literate in Spanish, are unable to meet the English literacy requirement of New York State

a violation of either the Privileges and Immunities or Due Process Clauses of the Fourteenth Amendment?

2. Is the English literacy requirement for voting a violation of the Equal Protection Clause of the Fourteenth Amendment and the prohibition of discrimination in the Fifteenth Amendment because its purpose and effect is to discriminate against specific groups in the population?

3. Does the New York English literacy requirement violate the Fourteenth and Fifteenth Amendments because it contains an impermissible "grandfather clause"?[1]

## Interest of the American Jewish Congress

The American Jewish Congress was formed in part "to help secure and maintain the equality of opportunity * * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "to help preserve and extend the democratic way of life." It has a special interest in assuring equal recognition of the social, economic and

1. The American Jewish Congress sought consent to file an *amicus curiae* brief in *Katzenbach* v. *Morgan*, October Term 1965, Nos. 847 and 877 as well as in this case. Consent was granted by the United States, the State and City of New York but not by the appellee. Accordingly, we do not discuss in this brief the question whether Congress validly nullified the New York English literacy requirement, in whole or in part, by adopting Section 4(e) of the Voting Rights Act of 1965. We note, however, that a decision in the *Morgan* case upholding the validity and effectiveness of Section 4(e) would not dispose of the issues to which this brief is addressed or render them moot. Section 4(e) does not invalidate the New York voting limitation *in toto* but merely suspends it as to persons educated in American-flag schools. Other American citizens, not literate in English, would be barred from voting in New York even if Section 4(e) were upheld.

political interests of minority groups and it combats discrimination against such groups whether on grounds of race, religion or national origin or because of the expression of unpopular views.

It is the belief of the American Jewish Congress that the disfranchisement of American citizens of Puerto Rican origin effected by the English literacy test established in New York is wholly unjustifiable and tends to perpetuate the hardships that this substantial minority group faces in its attempts to become part of the mainstream of American society. Although there were in the past a number of American citizens of the Jewish faith who were disfranchised by the requirement of English literacy, the major impact of this inequitable requirement falls today upon the Puerto Rican American who is literate only in the language native to his place of birth in this country.

No right is more cherished or more important to any segment of United States citizenry than the right to vote and to be heard by the executive, legislative, and judicial branches of the government. To shut off the voice of this substantial group of persons who reside within a fairly limited geographical area in the City of New York is to deprive them of their single most important political right.

The denial of appellant's application for relief continues in effect a set of laws which are inimical to two of the basic traditions of this country—universal adult suffrage and cultural pluralism. The issues presented on this appeal raise serious questions concerning the very core of our republican form of government and the preservation of American democratic principles.

## Summary of Argument

I. A. Denial of the right to vote to one who is literate in a language other than English in common use in the community in which he resides deprives him of privileges and immunities as a citizen of the United States and also of his liberty as a person, in violation of the Fourteenth Amendment.

The right to vote is an essential element of our democratic system which can be denied only upon the clearest evidence that the denial is required by the common weal. The state cannot and has not shown that disenfranchisement of appellant and others similarly situated is unquestionably necessary to achieve intelligent exercise of the ballot.

B. The right to vote impaired by the New York English literacy requirement should be found to be a privilege and immunity of Federal citizenship, protected against impairment by the Fourteenth Amendment. We urge the Court to reach this result, overruling or limiting, if necessary, its decision in the *Slaughter-House Cases*, 16 Wall. 37 (1873).

C. The same result can be reached under the Due Process Clause of the Fourteenth Amendment, since it is plain that the term "liberty" as used in that amendment includes the fundamental freedoms upon which our democratic society rests, including the right to vote.

II. A. The New York English literacy requirement violates the prohibitions of discrimination contained in the Fourteenth and Fifteenth Amendments.

B. The history of the New York requirement clearly demonstrates that its purpose was to discriminate against

later arriving persons who were not of "Anglo-Saxon stock." The arbitrary character of the requirement further supports the view that its purpose was not to protect the voting process.

C. A state literacy test which is intended to and is effective to discriminate among voters on the basis of national origin is unconstitutional under both the Fourteenth and Fifteenth Amendments.

III. The New York English literacy test is a "grandfather clause" which perpetuates discrimination in a manner that violates the Fourteenth and Fifteenth Amendments. It effects the same discrimination condemned in previous decisions of this Court dealing with grandfather clauses.

## ARGUMENT

## POINT ONE

**Denial of the right to vote to one who is literate in a language other than English, which is in common usage in the community wherein he resides, deprives him of his privileges and immunities as a citizen of the United States and his liberty as a person in violation of the Fourteenth Amendment.**

### A. The Role of the Right to Vote in our Constitutional System

The one element of a democratic government which, above all others, distinguishes it from all other forms of government is the participation of the people in the selection of those who govern them. We dissolved the political bonds which connected us with England because its King

denied us that right, and in our declaration of the causes which impelled the separation we asserted that only those powers are justly exercised as are derived from the consent of the governed. The Constitution which conferred powers on the independent government established after the severance was ordained by "We, the people."

Ideally, the consent of the governed is best exercised by the direct "town meeting" vote of the people on every legislative proposal—a procedure known in political science as pure democracy. This, obviously, was hardly practicable in 1787 and is even less so today. Our Constitution, therefore, set up the next best thing—representative government. Representative government, however, is democratic government only to the extent that the representatives are selected by the people they govern. This view has been expressed by this Court on many occasions.

Thus, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886), this Court said:

> Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it [the political franchise of voting] is regarded as a fundamental political right, because *preservative of all rights*. (Emphasis added.)

A more recent decision, *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964), reemphasized that view:

> *No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.* (Emphasis added.)

And it gave perspective to that concept by a quotation from No. 57 of *The Federalist* (*id.* at 18):

> "Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States * * *"

Again, in *Reynolds* v. *Sims,* 377 U. S. 533, 565 (1964), this Court said:

> * * * representative government is in essence self-government through the medium of elected representatives of the people and each and every citizen has an inalienable right to full and effective participation in the political processes of his state's legislative bodies.

There is, of course, always a gap between principle and practice. Objectives and ideals unavoidably find themselves compromised to the demands of political realities. Only the members of the House of Representatives were, in 1787, to be chosen "by the people." Senators were to be elected indirectly and were to be distributed upon a geographic rather than popular base. Inability to agree upon qualifications for voting impelled the constitutional fathers to leave the issue to the states for determination (with the significant command that they should be the same as imposed upon electors of the "most numerous branch of the state legislatures"), and within the states restrictions on access to the ballot were numerous and widespread. Women and Negroes were universally disenfranchised. So too were paupers and in some states non-landowners. In a few

non-Christians and even, under some circumstances, non-Protestants, could not exercise their franchise. Cobb, *The Rise of Religious Liberty in America*, 502.

It was, however, not the purpose of the Constitution to freeze these impairments of democracy into our governmental structure for all time. The history of the United States is a chronicle of expanding democracy. Steadily we have been progressing towards the ultimate (even if, perhaps, never fully attainable) goal of universal franchise. Religious restrictions upon voting disappeared first; the era of Jacksonian democracy brought an end to most state property qualifications. Negroes and women later achieved constitutionally protected access to the polling places. United States Senators were required to appeal to the people directly for their votes. Residents of the District of Columbia were enfranchised at least in part and the poll tax was removed as a barrier to the ballot box in Federal elections.

It is true that most of these changes were effected by express constitutional amendment or statutory enactment. Nevertheless, the judiciary too has its responsibilities of office. Can it be doubted that were the requirement in the original New York constitution that applicants for citizenship and thus for the franchise abjure all foreign allegiance, "ecclesiastical as well as civil," effective today it would be adjudged unconstitutional by this Court? It was the judiciary, after long default by the legislature, which mandated, as far as possible, the democratic principle of one man, one vote.

Democratic expansion did not come to a halt in 1787, even as far as the judiciary is concerned. The secret ballot was unknown then, but there is no question that it would be constitutionally protected today. Real property ownership qualifications for voting were widespread but even aside from the 14th Amendment would this Court uphold a Congressional statute limiting the right to vote in the District of Columbia to persons owning real property? The United States has called upon this Court to declare unconstitutional the poll tax requirement for voting in state elections even though the 24th Amendment is expressly limited to Federal elections.

Whatever may have been the situation in 1787, we submit that American constitutional democracy today requires that no person may, except for the gravest reasons, be denied the right to participate in the selection of the persons who exercise the power to govern him. As the Court said in *Reynolds* v. *Sims, supra,* 377 U. S. at 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

We submit that today, with the exception of children and the mentally incompetent,[2] every person has an inherent

2. John Locke, godfather of the Declaration of Independence and our representative government, recognized the validity of these exceptions (*Second Treatise on Government,* Laslett, ed.):

> 55. *Children,* I confess are not born in this full state of *Equality,* though they are born to it. Their Parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after, but 'tis but a temporary one. The Bonds of this Subjection are like the Swadling Cloths they are wrapt up in, and supported by, in the weakness of their

right to vote and a governmental deprivation of that right is constitutionally justifiable only upon the clearest evidence that it is required by the common weal. We submit further that this is one of the privileges and immunities guaranteed to the people by the 14th Amendment against abridgement by the states and a liberty guaranteed by it against deprivation by the states without due process of law.

We are not required in this case to challenge disenfranchisement of felons and non-citizens. Nor need we here challenge the assumption in *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1949), that the state has a sufficient interest in the intelligent use of the ballot

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Infancy. Age and Reason as they grow up, loosen them till at length they drop quite off, and leave a Man at his own free Disposal.

* * *

60. But if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of Reason, wherein he might be supposed capable of knowing the Law, and so living within the Rules of it, he is *never capable of being a Free Man* he is never let loose to the disposure of his own Will (because he knows no bounds to it, has not Understanding, its proper Guide) but is continued under the Tuition and Government of others, all the time his own Understanding is capable of that Charge. And so *Lunaticks* and *Ideots* are never set free from the Government of their Parents; *Children, who are not as yet come unto those years whereat they may have; and Innocents which are excluded by a natural defect from ever having; Thirdly, Madmen, which for the present cannot possibly have the use of right Reason to guide themselves, have for their Guide, the Reason that guideth other Man which are Tutors over them, to seek and procure their good for them, to seek and procure their good for them,* says Hooker, Ecc. Pol. Lib. 1. Sec. 7. All which seems no more than that Duty, which God and Nature has laid on Man as well as other Creatures, to preserve their Off-spring, till they can be able to shift for themselves, and will scarce amount to an instance or proof of *Parents* Regal Authority.

to justify conditioning it upon ability to read and write. Indeed, we can even concede that the most likely means of assuring the intelligent use of the ballot is to require literacy in the English language, even though thereby not only Spanish speaking citizens in New York but Japanese and Chinese speaking citizens in Hawaii are disenfranchised.

We submit, however, where an "inalienable Right" which is "of the essence of a democratic society" is concerned, it is not sufficient that the state has selected a likely method among various apparently reasonable alternatives. In such a situation the state is required to establish by the clearest evidence that no practicable alternative method to achieve a specific end exists other than disenfranchisement of citizens literate in a language other than English. We submit, finally, that in a community in which there are widespread organs of public communication in the citizen's tongue, such as newspapers, periodicals, radio and television, which regularly report and comment on matters of political interest and public concern, a state's determination that no practicable alternative exists cannot be sustained.

According to the 1959 Report of the United States Commission on Civil Rights, pp. 67-68, there are approximately 618,000 American citizens of Puerto Rican ancestry living in New York City. About 190,000 of them have lived here long enough to satisfy the state's residence requirements for voting. However, 59% of Puerto Rican residents of New York read and write only Spanish and are therefore not permitted to vote. Although the exact number so disenfranchised is not indicated in the Commission's report, it does state that "this Commission has found that Puerto

Rican-American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York."

We submit that only the most cogent grounds can justify the denial of the franchise to so substantial a number of American citizens who are residents of New York. It is quite reasonable that a court in reviewing the constitutionality of a statute should give great weight to the judgment of the legislature in its determination of the necessity of the legislation. Ordinarily, if a situation exists which the legislature deems to require legislative action, the courts will not interfere with its determination of the appropriateness of a particular remedy unless the legislature's act was patently unreasonable. *United States* v. *Carolene Products Co.*, 304 U. S. 134, 152-3 (1958). Where, however, the legislation abridges a fundamental right of American citizens, a far sterner test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). As was said in *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940):

> Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.

Where the legislation restricts the right to vote, the most stern judicial test is to be applied when its constitutionality is challenged. In *United States* v. *Carolene Products, supra,* 304 U. S. at 152-3, n. 4, the Court did not find it necessary "* * * to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * *" In subsequent cases, however, the Court did find it necessary to pass upon the question and answered it in the affirmative. *Thomas* v. *Collins, supra; Thornhill* v. *Alabama, supra.*

The reason for the imposition of a sterner test in cases involving fundamental liberties, particularly those affecting the franchise, is obvious. One may well urge that, in general, removal of unwise laws should be sought by appeal not to the court but to the ballot and to the processes of democratic government. But this necessarily implies that recourse to the ballot is unobstructed and that the processes of democratic government are kept free to operate. It follows that the Court should subject to a closer than ordinary scrutiny and impose more exacting standards in respect to legislative actions that obstruct the channels for legislative change. It little profits the Spanish-speaking Puerto Ricans that the literacy test assailed here can be removed by action of the legislature if they are barred from participating in the process of selecting the legislature. In such a case, the Court must assume something of the nature of a fiduciary for the protection of

the otherwise unprotected disenfranchised and must demand a strict accounting on the part of the legislature.

This is particularly so where the disenfranchised are a racial, religious or national minority. *United States* v. *Carolene Products, supra; Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Farrington* v. *Tokushige,* 273 U. S. 284 (1927).

This Court therefore must determine what legitimate end the assailed literacy test sought to achieve, and whether the use of the literacy test is a valid means to achieve that end. In this respect, we submit that the only legitimate end that could be sought to be achieved was to assure that citizens exercising their elective franchise have a reasonably intelligent understanding of the issues and the candidates upon whom they are called to pass judgment, so that they can make "intelligent use of the ballot." *Lassiter* v. *Northampton County Board of Elections, supra,* 360 U. S. at 51.[3]

3. It is, we submit, beyond the constitutional power of the legislature to employ the grant or withholding of the elector's franchise as a means to induce persons to learn the English language. We do not challenge the power of the state to encourage and facilitate the learning of the English language by residents of the state. For that purpose the states and municipalities can and do provide free instruction in the English language for foreigners and engage in public campaigns to induce residents to learn English. However, to deny persons their constitutional right of engaging in the election of their government as a means to influence them to learn English is, we submit, a form of impermissible coercion.

In *Meyer* v. *Nebraska, supra,* this Court held that a state could not declare it a crime for persons to teach children a foreign language; and in *Farrington* v. *Tokushige, supra,* it held that the operation of a foreign language school could not be hampered by unreasonable and arbitrary regulations motivated by a desire to discourage the learning of a foreign language. In *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943), it held that the privilege of attending a free public school could not be withdrawn

It follows, therefore, that only if this Court finds by clear, cogent and convincing evidence that a person literate in a language other than English cannot intelligently exercise the ballot, can the statute assailed herein be upheld. It follows, also, that the burden of establishing this necessity is upon the state. The right of American citizens to vote in elections is a precious one, of which they should not be deprived except for the most grave reasons. It is not enough that persons literate in English *may* exercise the ballot more intelligently than those literate in Spanish. That college graduates *may* exercise the ballot more intelligently than elementary school graduates would not justify disenfranchisement of the latter. To justify the deprivation of so fundamental a right, the state must establish that such disenfranchisement is unquestionably necessary to protect the electoral process.

For the following reasons, we submit that there is no such cogent proof that literacy in English is necessarily required for intelligent exercise of the ballot as would justify the denial to so many American citizens of the fundamental democratic right to participate in the selection of their government:

1. The literacy in English qualification is barely a quarter of a century old. For a century and a half the State of New York, beginning with its Constitution of 1777, did not require literacy in English as a requisite to vote.

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from children who refused to salute the flag or pledge allegiance to it. This, the Court held, was as much a form of coercion as the means employed in the *Meyer* and *Tokushige* cases. Since the legislature patently cannot coerce adult persons to learn the English language, it cannot achieve this end indirectly by withholding from them a constitutional right unless they do so.

During that period many illustrious and great persons were elected to high office in the State of New York. Three of its governors became Presidents of the United States. Certainly there is not the slightest evidence that, during this period, the fact that persons not literate in English participated in the selection of the government was in any way prejudicial to the public welfare.

2. Even today more than three-fifths of the States of the Union have no literacy qualification at all for voting. Thus, in 31 of the 50 states, one need not be literate in any language in order to cast a ballot. *Lassiter* v. *Northampton County Board of Elections, supra,* 360 U. S. at 52, n. 7. There is no reason to believe that the administration of the government and laws in these states is inferior to that in the other 19 states. Without regard to whether the requirement of literacy is reasonable, we urge that, in view of the fact that three-fifths of the states require no literacy at all, there is no clear need for the requirement of literacy in English.

It should be noted further that of the 19 states which do have a literacy requirement only 12 specify that the literacy be in English. Hence, of the 50 states in the Union, fully 38 states do not require literacy in English as a qualification for voting.

3. Whatever might be the case in respect to some rarely used foreign language, literacy in so widely used a language as Spanish assures that the Spanish-speaking voter can be fully enough familiar with the issues and candidates presented to him to make an intelligent choice.

As the United States Commission on Civil Rights has shown in its 1959 Report, p. 67, there are three Spanish-language newspapers, having a combined daily circulation of 82,000, published and distributed in New York. Two of these newspapers, *El Diario* and *El Emparcial*, have a format similar to that of the English language *Daily News*. Like the English-language prototype, the first six pages of *El Diario* and *El Emparcial* are mainly devoted to current political and civic issues. The more significant political and civic issues are explored further by featured columnists and in the editorials. Prior to September 17, 1959, *La Prensa* was much like the *World Telegram and Sun* and the *Herald Tribune* in format and coverage. Since that date the more popular tabloid form of layout has been adopted. However, the coverage is apparently as complete as before.

The Spanish newspapers use the same news services as the English press. In addition, there are a number of radio and television stations in New York regularly broadcasting news and news analyses in Spanish. These programs are listed in detail in the Spanish press.

Whatever need there may have been for literacy in English as a means of obtaining political information 40 years ago when the New York requirement went into effect, it has been largely if not completely eliminated by the advent of radio and television. In 1925, only 10% of the homes in the United States owned radio sets. By 1940, 82% owned radios, Bogart, *The Age of Television*, 10 (1956), and a study of that election concluded that "radio proved more effective than the newspaper" because of its

"face-to-face contact with the principals" and the "personal relationship" established. Lazarsfield, Berelson and Gaudet, *The People's Choice,* 128, 129 (second edition 1948). In 1956, 98% of the homes in the United States owned radios and 73% owned television sets. Bogart, *supra.* The percentages are undoubtedly higher today and the influence of radio and television upon voters has dwarfed the importance of the printed word. Thus, there is even less reason today to disqualify Spanish-speaking voters and continue to deny to them a most cherished right and privileges.

### B. The English Literacy Requirement for Voting Violates the Privileges and Immunities Clause of the Fourteenth Amendment.

We believe we have established that there is no such compelling need for New York's English literary requirement as to justify denial of the right to vote to a substantial number of citizens. If so, the requirement is unconstitutional either as a denial of privileges and immunities guaranteed under the Fourteenth Amendment or as an impairment of a liberty protected by that Amendment's Due Process Clause. We deal with the latter concept below. Here, we urge that this Court reach the suggested result under the Privileges and Immunities Clause, overruling to whatever extent necessary its decision in the *Slaughter-House Cases,* 16 Wall. 37 (1873). We submit that the time has come to take that step toward restoration of the full intended effect of the Fourteenth Amendment.

"Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment en-

joys the distinction of having been rendered a 'practical nullity' by a single decision of the Supreme Court rendered within five years after its ratification." *Library of Congress Edition of the Constitution* (1964), pp. 1075-1076. This came about because the Court interpreted the clause as limited to the protection of those privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Slaughter-House Cases, supra,* at 79.

As has often been noted, this restrictive interpretation of the Clause makes it completely superfluous. Privileges and immunities so limited are already protected by the Supremacy Clause and by the Federal Government's inherent power to protect its own processes and institutions. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). The decision in the *Slaughter House Cases* sets forth among the examples of privileges which owe their existence to the National Government access to the Federal Courts. But can there be any doubt that, were there no Fourteenth Amendment, this Court would hold unconstitutional a law passed by a jealous state making it a criminal offense for its citizens to resort to the Federal courts for judicial redress of their grievances?

In *United States* v. *Aaron Burr,* 4 Cranch 470, 482, the greatest of Chief Justices noted that, "Every opinion to be correctly understood ought to be considered with a view to the case in which it was delivered." An examination of the circumstances surrounding the *Slaughter-House Cases* decision and of the later opinions of the Justices who joined in the majority and minority opinions indicates

quite clearly that the underlying motivation of the majority of the Court was to forestall use of the Amendment as a means, urged by the appellants in the case, to censor and restrict state regulation of business. The majority therefore asserted that the sole "pervading purpose" of the Amendment was to assure "the freedom of the slave race."

The expectations or hopes of the majority were doomed to frustration. In succeeding years the Amendment was used far more to protect the interests of business than the rights of the Negro race; substantive due process provided an adequate and satisfactory alternate route after the road via privileges and immunities was closed.

In any event, nullification of the Privileges and Immunities Clause is today no longer necessary. The uniform holding and tenor of the Court's decisions from *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937) to *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963) show unmistakably that the Court has no intention to use the Fourteenth Amendment to censor State regulation of business. We submit that the time has come for the Court to restore to privileges and immunities the meaningfulness it took from it in the *Slaughter-House Cases.* To paraphrase in reverse the words of Job, what the Court has taken away, the Court can give.

Specifically, what we urge is that the right of a citizen to participate in the selection of those who govern him is a privilege of citizenship of which the Fourteenth Amendment forbids deprivation by the State in the absence of the clearest evidence that deprivation is required to pro-

tect a paramount societal interest and that there is no available alternative to protect the interest.

Nor should the Court be deterred by undue concern for an extreme interpretation of the limitations imposed by the principles of federalism. Federalism is a means, not an end, and where federalism stands in the way of assuring to citizens their inalienable right to participate in the selection of their governors, it is federalism rather than the right which should yield ground. This, in any event, was the entire *raison d'etre* of the Fourteenth Amendment, as this Court has recognized in innumerable decisions.

Should, however, the Court decide that it cannot go so far, we submit that the same result be reached by a narrower interpretation of the Privilege and Immunities Clause, one fully consistent with the restrictive interpretation in the *Slaughter-House Cases* as further interpreted in *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908). Insofar as elections to Federal office are concerned, it is hardly contestable that the right to participate therein owes its existence to the national government. If, as this Court held in *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), freedom to use municipal streets and parks for public discussion of a law enacted by Congress is a privilege or immunity which owes its existence to the national government, certainly so too is the freedom to participate in the election of members of the Congress that enacts the law. Hence, at the very least, the Court should hold the New York law unconstitutional in respect to elections for the President and members of Congress.

However, we urge the Court to go further. We submit that the powers and functions of a state legislature are so inextricably related to the national government that a deprivation of the right to vote for members of the state legislature impairs privileges and immunities protected by the Fourteenth Amendment. We note, for example, that when a state legislature passes upon a resolution to amend the Federal Constitution, it is exercising a power and responsibility which is derived from the national government through the national Constitution. *Hawke* v. *Smith*, 253 U. S. 221 (1920); so, too, when it prescribes the rules and regulations for primaries at which candidates for Federal office are selected (*Smith* v. *Allwright*, 321 U. S. 649 (1944)), or when it apportions districts from which members of the House of Representatives are elected (5 Stat. 491 (1842)); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), or when it calls upon the national government to protect it against domestic violence (U. S. Constitution, Article IV, Sec. 4).

Nor is this interdependency of Federal and State governmental functions limited to the legislature. The right of a state governor to demand extradition from another state has its source in the Federal Constitution (Article IV, Sec. 2), as has the right to call upon the national government for protection against domestic violence (*Id.*, Sec. 4).

Even the state judiciary exercises powers whose source is in the national government. Its judicial proceedings are accorded extraterritorial effectiveness only by reason of the Full Faith and Credit Clause of the National Constitution (Article IV, Sec. 1).

Finally, we note the many and ever-increasing instances of what has been called cooperative federalism—the joint efforts of the national government and the states in achieving such common objectives as security against want in old age or in unemployment or extended education on the elementary, secondary and college level or provision for the ill and physically injured who require hospital care.

These and many other instances can be cited in support of our basic proposition—that the Federal and state governments are so inextricably interrelated and interdependent that deprivation of the right to participate in the selection of state government directly and inevitably impairs privileges and immunities whose source is in the national government.

### C. The English Literacy Requirement for Voting Violates the Due Process Clause of the Fourteenth Amendment.

Finally, we submit that the result urged herein can be achieved under the Due Process Clause of the Fourteenth Amendment. Ever since *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court has recognized that the term "liberty" in the Fourteenth Amendment encompasses much more than freedom from physical restraint, and includes the fundamental freedom upon which our democratic society rests. Can it be doubted that if "liberty" includes freedom of speech, press and assembly, it also includes freedom to chose those who exercise the compulsory powers of government? Is not a major reason for freedom of expression that it ensures intelligent and responsible choice in the selection of those who exercise their just powers by reason of the consent of the governed? What

does it profit a Spanish-speaking Puerto Rican that he has the right to hear all views on public issues if he is barred from exercising the right of suffrage on the basis of conclusions reached after constitutionally-protected exposure to these views? Freedom of speech would be an illusory right if the listeners were forbidden to act upon what they heard.

Of course, due process extends beyond "citizens" to "persons." We do not here contend that restricting the ballot to citizens unconstitutionally deprives non-citizens of their liberty under the Fourteenth Amendment. Only such deprivations as are "without due process of law" are forbidden by the Amendment, and it may well be held that a requirement of citizenship is within the purview of due process. We urge only that, for the reasons heretofore stated, disenfranchisement of citizens who are literate, though in a language other than English, does constitute a deprivation of liberty without due process of law.

## POINT TWO

**The New York requirement of literacy in English is not one reasonably related to any valid Constitutional purpose but was intended to and has the effect of discriminating against an isolated minority group in violation of the Fourteenth and Fifteenth Amendments.**

In Point One, we have assumed that the English literacy requirement was in fact adopted by New York State for the purpose of insuring intelligent voting, arguing only that no sufficient case could be made for limiting the

franchise in this fashion. We here urge that the requirement is in fact a restriction aimed at specified groups in the population and, as such, is a violation of the Equal Protection Clause of the Fourteenth Amendment and the prohibition of discrimination based on race or color in the Fifteenth.

### A. Limitations on the Power of the State to Restrict the Right to Vote

Although a state may within certain limitations prescribe the qualifications of voters as provided by the Constitution of the United States, Article I, Section 2, the basic right to vote, at least in general elections, is not derived from state law but is "a right secured by the Constitution." *Smith* v. *Allwright*, 321 U. S. 649, 662 (1944). See also, *U. S.* v. *Classic*, 313 U. S. 299 (1941); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Ex parte Yarbrough*, 110 U. S. 651 (1884). There are several qualifications that a state may not require of voters. Race, color, or previous condition of servitude as well as sex are specifically barred as permissible standards by the Fifteenth and Nineteenth Amendments. Nor may a state prescribe qualifications which contravene the Equal Protection Clause of the Fourteenth Amendment. *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Nixon* v. *Condon*, 286 U. S. 73 (1932). "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' See *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 * * *." *Baker* v. *Carr*, 369 U. S. 186, 244 (1962) (concurring opinion). Thus, while a state has the lawful power to alter its subdivisions, if in doing so it

singles out a readily isolated segment of a racial minority for special discriminatory treatment it violates the Federal Constitution and its otherwise lawful act is overcome by the prohibitions contained therein. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

### B. The Discriminatory Intent and Effect of the New York English Literacy Requirement

A proposal that the right to vote in New York State be limited to those literate in English was proposed at a Constitutional Convention held in 1915. After full debate, which is a matter of public record, the proposal was defeated. Nevertheless, it was renewed at the 1917 session of the New York State Legislature and was approved by both chambers. N. Y. L. 1917, pp. 2785, 2786. It was passed again at the 1919 session of the Legislature (N. Y. L. 1919, pp. 1790, 1791), and was placed on the ballot for popular vote in the 1921 election. It was approved by the voters that year. N. Y. L. 1922, p. 1849.

Although the constitutional provision imposing a literacy test was defeated at the 1915 Constitutional Convention, the debates at the sessions of that body are the best available evidence of the basis on which the case for the proposal rested. (There is no public record of the debates in the New York State Legislature.)

The provision requiring literacy in "the mother-tongue" was first proposed at the Convention by Charles H. Young who said, in support of the amendment:

> More precious even than the forms of government are the mental qualities of our *race*. While those stand

> unimpaired, all is safe. They are exposed to a single danger, and that is by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of *Southern and Eastern European races* * * * The danger has begun * * * We should check it * * *. 3 *New York State Constitutional Convention* 3012 (revised record of 1916) (emphasis added).

The level of the arguments in favor of the proposal is illustrated by the remarks of Gordon Knox Bell, who said:

> Gentlemen, we must stop to think of what we are. This is not a question of nations, *it is a question of races,* and when all is said and done, there is not a man in this room who dares deny that we are *an English race,* born and bred and brought up with the traditions of the men of England; of *Anglo-Saxon stock. Id.* at 3015 (emphasis added).

Mr. Bell traced the history of the settlement of England and, although denying that he was an "Anglo-maniac," concluded after an astounding outburst, that if there were any greater word than "Englishman" it must be the word which signifies that heritage as embodied in our language. *Id.* at 3015-17.

The proposal was recognized as an attempt to prevent the assimiliation of "alien blood" into the supposedly pure Anglo-Saxon heritage of the nation by segregating and excluding foreign-born Americans from the rights, privileges and opportunities of full citizenship. Its proponents impugned the patriotism of Yiddish-speaking citizens and demeaned almost every national group other than the

English. In opposition to the proposal, Mr. Nathan Burkan made the following plea:

> The highest and most priceless privilege of a citizen is the right to participate and have a voice in the government—the right to vote for all officials and for the adoption and rejection of fundamental laws.
>
> * * *
>
> It is abhorrent to believe that those who toil by the sweat of their brows, who create and improve prosperity, who aid in the development of the great resources of this state and in the building up of its industries and commerce shall be disfranchised because they cannot comply with an irksome test. *Id.* at 3152-53.

Robert F. Wagner, late United States Senator from New York, said of the proposed requirement:

> * * * Obviously that proposal is directed against the foreign born American. Remembering that the great mass of foreigners that come annually to our shores are assimilated into and become part and parcel of the American people because they strive and hope and succeed in acquiring the right to vote, can you not recognize in the amendment a clandestine effort to prevent this assimilation of alien blood into our citizenship and to segregate and exclude the foreigner from the rights, the privileges and the opportunities which we have always held out to all men?
>
> * * *
>
> [I]n so far as you dare to go, you take from [the foreigner] the opportunity and the privileges which your ancestors enjoyed when they like the immigrants of today found in this land a refuge from the very spirit of intolerance and hate which finds expression in this amendment. *Id.* at 3022-23.

In short, the case for the voting restriction was strikingly similar to that made, during this period, in Oregon for a statute prohibiting instruction of children in a foreign language—that that practice was "inimical to our own safety" because the children would "always think in that language." *Meyer* v. *State,* 107 Neb. 657, 187 N. W. 100 (1922). That decision, of course, was reversed by this Court. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923).

The period during which the constitutional provision was thereafter approved by the Legislature and the voters, during and after World War I, was marked by inflammation of national hatred of minority groups, particularly aliens and recent citizens of foreign extraction. The end of hostilities did not stem the tide. In addition to the enactment and enforcement of various sedition, anarchy and criminal syndicalism laws, there was widespread interference with free expression in the form of seizures of newspaper files, restrictions on mailing rights and prosecutions of educators and others for "disloyal language." This period also saw the enactment of the national immigration law establishing the offensive national origins quota (recently repealed), legislation presaged by the mass deportations of aliens without even a semblance of due process, characterized by Professor Zechariah Chafee as "wholesale deportation for ideas." Chafee, *Free Speech in the United States* 237 (1948). The free speech controversy during the war and the restrictive legislation following the war led Charles Evans Hughes to wonder "whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged." *Id.* at 102.

Oregon enacted legislation outlawing all private and parochial schools. Several states, like Nebraska, passed laws making it a crime to teach foreign languages, or to teach any subject in a foreign language, to children in grade school. In New York, six of twelve laws characterized as affecting freedom of speech were enacted during the period 1917 to 1921. *Id.* at 590-91. The mayor of the City of New York, after the Armistice of 1919, banned the performance of operas in the German language. *Star Opera Co.* v. *Hylan*, 109 Misc. 132, 178 N. Y. S. 179 (1919).

But it was the Legislature of New York, during the very period in which it submitted the English literacy requirement for adoption, that most vividly displayed hostility to the "foreign-born" in its notorious expulsion of the five lawfully elected Socialist assemblymen in 1920—truly a repudiation of government by representation and the disfranchisement of the assemblymen's constituents. At a hearing likened to the Salem witch trials, amid testimony involving a "little red book" in Yiddish and a fantastic story by a young girl that one of the five had "spit upon the American flag," the speaker of the New York State Assembly charged that the Socialist Party was "not truly a political party, but is a membership organization admitting within its ranks aliens, enemy aliens and minors." Despite vigorous editorial comment branding the action of the assembly a "legislative lynching," the powerful forces spawned by extreme chauvinism and xenophobia marched onward. See Chafee, *op. cit. supra* at 278-79; Waldman, *Albany: The Crisis in Government* xvi, xvii, 4, 25-27, 40-42 (1920).

The fact that New York's English literacy requirement was not in fact designed to advance intelligent voting is shown not only by its history and background but also by the arbitrary and unreasonable nature of some of its provisions. If actually aimed at assuring that voters have the ability to acquire information about elections, why should New York require that persons be able to *write* as well as read English? The only writing necessary properly to exercise the franchise of voting involves simply the writing of one's own name. Must a person be able to communicate election information to others in order to be able to vote intelligently? Furthermore, an exception is made for all persons who cannot read or write English because of physical handicaps and also for veterans. Election Law, Sections 155, 168(6), 201. The ability of such persons to acquire information about elections is, in many cases, substantially less than that of persons literate only in Spanish. These exceptions, we submit, buttress the conclusion that the thrust of the voting restrictions is to penalize persons whose native language is other than English.

Another indication that the New York literacy-in-English requirement was enacted for an unlawful and unconstitutional purpose rather than as a bona fide attempt to assure an informed electorate is the "Grandfather Clause" contained in the provision of the New York constitution which establishes the test. This aspect of the law is discussed in detail in the next section of this brief as an independent reason for invalidating the test. It is, however, pertinent to note here this added indication that the clause, as written, represents an unreasonable requirement enacted for an unconstitutional purpose.

### C. A State Literacy Test Which is Intended to and is Effective to Discriminate Against National Origin Groups is Unconstitutional.

For the purposes of this aspect of this brief, we do not contend that a literacy test may never be justified as a reasonable attempt to assure an independent and intelligent electorate. *Cf. Lassiter* v. *Northampton County Board of Elections, supra; Stone* v. *Smith,* 159 Mass. 413, 34 N. E. 521 (Mass. 1893). However, if state legislation establishing such a test is on its face merely a device to effect prohibited discrimination or, though fair on its face, may be or is employed to perpetuate discrimination, it is unconstitutional. *Davis* v. *Schnell,* 81 F. Supp. 872 (S. D. Ala.), *aff'd mem.,* 336 U. S. 933 (1949). *Cf. Lassiter, supra,* 360 U. S. at 50, 53. Nor is a literacy test valid if literacy is "used as a cloak to discriminate against one *class* or *group.*" *Gray* v. *Sanders,* 372 U. S. 368, 379 (1963) (emphasis added).

In *Pope* v. *Williams,* 193 U. S. 621 (1904), which upheld the reasonableness of a non-discriminatory residence requirement, this Court noted that the situation would be different where a statute presented a possibility of violating the Federal Constitution. Interestingly, the hypothetical situation there contemplated as an example of an "extreme case"—discrimination between persons coming from different states (i.e. Georgia and New York)—is similar to the instant case where the proscription, in its operation, necessarily discriminates against persons coming from Puerto Rico where Spanish is the native language as against persons coming from the United States mainland. The New York Legislature has singled out United States

citizens of Puerto Rican origin and other later-arriving "foreigners" who are literate only in Spanish—a readily isolated minority group living in a localized area under marginal conditions—and has deprived them of the vote, one of their strongest weapons for improving their lot and equalizing their opportunities. *Cf. Carrington* v. *Rash,* 380 U. S. 89 (1965); *Mabry* v. *Davis,* 232 F. Supp. 930 (W. D. Tex. 1964).

The words "race" and "color" as used in the Fifteenth Amendment are not to be confined to a narrow, technical meaning. They include nationality groups, such as non-English speaking persons of Puerto Rican origin. See *Comacho* v. *Rogers,* 199 F. Supp. 155, 160 (S. D. N. Y. 1961). The proponents of the New York constitutional provision here in question referred to such nationality groups as "races," and the requirement of English literacy was intended to discriminate on the basis of "race" in violation of the Fifteenth Amendment.

In any event, discrimination based upon either "race or place of origin" is unconstitutional. See *Wright* v. *Rockefeller,* 376 U. S. 52, 58 (1964). The dissenting opinion in the lower court in that case is particularly illuminating:

> * * * the above uncontradicted picture establishes *per se* a *prima facie* case of a legislative intent to draw congressional district lines * * * on the basis of race and national origin. To me it fits four square with Mr. Justice Frankfurter's statement in Gomillion v. Lightfoot * * * that the act in question was not an ordinary geographical re-districting measure even with the familiar abuses of gerrymandering. Although

Justice Frankfurter's statement referred to the court's holding that there was a violation of the fifteenth amendment this statement is equally apposite to the equal protection clause of the fourteenth amendment under Brown v. Board of Education * * * Cf. the concurring opinion of Mr. Justice Whittaker in Gomillion at 349 * * * The conclusion here is, as in Gomillion, irresistible, tantamount for all practical purposes, to a mathematical demonstration that the legislation was solely concerned with segregating white, and colored and Puerto Rican voters * * *

* * *

* * * The pattern * * * shows that they were drawn so that any district lines encompassing these areas would *necessarily include a very high percentage* of non-whites and Puerto Ricans * * *

We are told that the fifteenth amendment nullifies sophisticated as well as simple-minded discrimination. In my judgment the New York legislature has attempted, in violation of the equal protection clause of the fourteenth amendment, a sophisticated and subtle discrimination * * * *Wright* v. *Rockefeller,* 211 F. Supp. 460, 472-75 (S. D. N. Y. 1962) (dissenting opinion) (emphasis added).

In several recent cases, the federal courts have stricken down discriminatory applications of voting requirements by the states. See *U. S.* v. *Clement,* 231 F. Supp. 913 (W. D. La. 1964); *U. S.* v. *Palmer,* 230 F. Supp. 716 (E. D. La. 1964). A literacy test designed and used to discriminate against Negroes was held to violate the Fourteenth and Fifteenth Amendments. *U. S.* v. *Louisiana,* 225 F. Supp. 353 (E. D. La. 1963), affirmed, 380 U. S. 145 (1965). Where the purpose *and* effect of state requirements are to discriminate, the law is unconstitutional and the *motive*

of the legislators in enacting the law is of importance in making such determination. See *U. S.* v. ***Mississippi***, 229 F. Supp. 925, 982 (S. D. Miss. 1964) (dissenting opinion), *reversed*, 380 U. S. 128 (1965). The *Lassiter* case does not hold that a literacy test chosen to *deny*, not grant, voter privileges is free from attack.

It may be that a state can constitutionally use a literacy test to attempt to assure that all voters are capable of becoming sufficiently informed to make a considered judgment when they cast their ballots. At the other end of the spectrum, it is clear that a voter qualification test designed to weed out persons who would tend to vote certain beliefs or favor certain persons or political parties is unconstitutional. *Carrington* v. *Rash*, *supra*, 380 U. S. at 94 (1965). Thus, a test barring persons who are wholly illiterate could more easily be justified than, say, an IQ test. Certainly, an IQ test with a minimum passing score of 120 established on the theory that only such exceptional persons can "properly" cast their ballots is repugnant to democratic principles and unconstitutionally discriminatory as well. If a Southern state were to conduct a survey of its population with respect to certain criteria which have been held individually to constitute valid limitations on the right to vote (e.g. one-year residence in the state, literacy, no felony convictions) and then enacted those requirements which, according to its survey, would disfranchise a maximum number of Negroes while permitting a maximum number of whites to vote, would not this Court strike down the plan?

While the New York legislators were not as blunt as members of the Constitutional Convention which enacted

the Louisiana literacy test (see *U. S.* v. *Louisiana, supra,* 225 F. Supp. at 373, 374), the debates referred to above leave little doubt that the basic motive and purpose behind the enactment of the New York English literacy test was to deprive later-arriving immigrants of their vote. The Puerto Rican influx had not yet begun at the time the New York test was enacted and, if there was any particular group at which the test was aimed, it was probably the large Yiddish-speaking community. Due to unforeseen circumstances, the most effective deprivation now occurs not with respect to immigrants but to native American citizens of Puerto Rican origin who have migrated to New York, although there are also a number of American citizens of the Jewish faith who are still disfranchised by the requirement of English literacy.

Both the intent of the legislation and its actual effect are important fields of inquiry in order to determine whether it is constitutional. See *Oyama* v. *California*, 332 U. S. 633, 651 (1948) (concurring opinion). In the *Oyama* case, Justice Murphy noted that the legislation in question was "spawned of the great anti-Oriental virus" that infected the nation at the time. *Id.* at 651. The New York English literacy test was spawned from an invidious anti-foreigner virus and the victimized class will "necessarily include a very high percentage of Puerto Ricans" as in *Wright* v. *Rockefeller, supra.* It is an unreasonable restriction enacted for the unlawful purpose of discriminating against non-English-speaking persons by depriving them of the right to vote.

## POINT THREE

**The New York English literacy requirement is an unconstitutional "Grandfather Clause" clearly violative of the Fourteenth and Fifteenth Amendments to the Federal Constitution.**

The New York constitution excludes from the requirement of literacy in English all persons who were "entitled to vote by attaining majority, by naturalization or otherwise" prior to January 1, 1922. Residents of New York possessing all the qualifications of voters prior to that date but who have never exercised their right to vote are, nonetheless, exempt from the literacy test. *Ferayorni* v. *Walter*, 121 Misc. 602, 202 N. Y. S. 91 (1923). However, any person who establishes residence in New York after that date must prove his literacy in English. Op. Atty. Gen., 48 St. Dept. 179 (1933). Thus, American citizens of Puerto Rican origin, even native-born citizens like appellant, who had not established residence in New York prior to 1922 have not been able since that date to register and vote in New York (although they may have voted in elections in the United States for many years) if they are literate only in Spanish, the language native to their place of birth and education in the United States. By contrast, persons who were merely eligible to vote in New York prior to 1922, although wholly illiterate, have been *and are today* eligible to vote. Special assistance may be rendered only to such illiterates who "became entitled to vote on or before January first, nineteen hundred twenty-two." Election Law, Sections 169, 199.

Any possibility that the cutoff provision was reasonably related to a valid administrative purpose is negated by the wholly unjustified breadth of the exemption (see e.g., Election Law, Sections 155, 168(6)) and the unwarranted inclusion in the exempt class of all persons then eligible to vote although they had never voted and might not first register until many years after the literacy requirements were in effect.

In *Guinn* v. *United States*, 238 U. S. 347 (1915), this Court struck down a state-imposed prerequisite for voting which required a literacy test in English for all residents of Oklahoma except any person "who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government or who at that time resided in some foreign nation and (any) lineal descendant of such person." Although aimed at excluding later-arriving foreigners, not a minority group already residing within the state, in all material particulars the New York test shares the fatal defects of the Oklahoma legislation.

One of the bases of the *Guinn* decision was the pattern of discrimination established by the legislation. This Court there adopted the description of the statute given by the Solicitor General (238 U. S. at 352, 364):

> The necessary effect and operation of the Grandfather Clause is to exclude practically all illiterate Negroes and practically no illiterate white men, and from this its unconstitutional purpose may legitimately be inferred.
>
> • • •

> In practical operation the amendment inevitably discriminates between the class of illiterate whites and illiterate blacks as a class to the overwhelming disadvantage of the latter.

In 1957, a Grandfather Clause similar to the one considered in *Guinn*, but which required that, to be exempt from the special voting prerequisites, a person must have been permanently registered to vote prior to 1908, was declared clearly violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. *Lassiter* v. *Taylor*, 152 F. Supp. 295, 297 (N. C. 1957). When the matter reached this Court, the Grandfather Clause had been repealed but this Court observed (360 U. S. at 49-50):

> Appellant points out that although the cut-off date in the grandfather clause was December 1, 1908, those who registered before then might still be voting. If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless she passed it, members of the white race would receive preferential privileges contrary to the command of the Fifteenth Amendment. * * *

In New York today there are persons 65 years old and older who may vote (even if for the first time) without taking the literacy test whereas appellant and a substantial number of other persons similarly situated may not vote unless they pass a test measuring literacy in English, *the exact form of preferential privilege* which this Court held clearly unconstitutional in the *Guinn* and *Lassiter* cases. That the discrimination is based upon "place of origin" rather than race is irrelevant. See *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (1964).

While the provision exempting "lineal descendents" was significant and gave rise to the "grandfather" designation, the cases do not limit their reasoning to clauses containing such a provision. In addition to emphasizing the pattern of discrimination between voters similarly situated, this Court in *Guinn* noted that the legislation (238 U. S. at 364-5):

> • • • contains no express words of an exclusion from the standard which it establishes of any person on account of race, color or previous condition of servitude prohibited by the fifteenth amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th amendment and makes that period the controlling and dominant test of the right of suffrage.

The New York situation is similar. At the cutoff date there were relatively few Puerto Ricans or other nonwhite, foreign-speaking persons in New York who could qualify to vote by virtue of the exemption of then-eligible voters. The timing of the English literacy requirement was, as we have seen, for the purpose of excluding the expected influx of non-English "races." It was also provided by statute that a certificate or diploma evidencing completion of the 8th grade in a school in which English is the language of instruction is acceptable proof of literacy. Election Law, Section 168. This latter provision virtually assures that all persons educated on the United States mainland, where compulsory education in the English language is the rule, will be eligible to vote although a substantial number may be functional illiterates. Thus, the pattern of invidious discrimination established by the Grandfather Clause is continued and reinforced.

That the original discriminatory purpose for enacting the New York clause was not directed against the particular group which is most directly affected by the resultant legislation is of no consequence. Quoting directly from *Guinn*, but substituting "Puerto Ricans" for "Negroes," it is clear that the New York Grandfather Clause excludes "practically all illiterate [Puerto Ricans] and practically no illiterate white men, and from this its unconstitutional purpose may legitimately be inferred." *Guinn* v. *U. S., supra,* at 352. It "discriminates between illiterate whites and illiterate [Puerto Ricans] as a class, to the overwhelming disadvantage of the latter." *Ibid.* Despite the absence of "express words of an exclusion from the standard which establishes it of any person on account of" prohibited grounds, "the standard itself inherently brings that result into existence." *Id.* at 364, 365.

A state undoubtedly has power to enact stricter voter requirements. However, any new requirement must be truly prospective and free from any resultant discrimination against racial or ethnic groups, especially where it can fairly be said that such discriminatory effect (or a similar effect) was the purpose of the enactment.

> * * * on a subject like the one under consideration involving the establishment of a right whose exercise lies at the very basis of government a much more exacting standard is required than would ordinarily obtain. * * * *Id.* at 366.

As in the *Guinn* case, the whole of the one-sentence New York constitutional provision regarding literacy in English must fall as an unconstitutional Grandfather Clause.

## Conclusion

In *Meyer* v. *Nebraska, supra,* this Court said (262 U. S. at 401):

> *The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.* Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. (Emphasis added.)

We submit that, to appellant and other Americans who were not "born with English on the tongue," the "protection of the Constitution" means little if they are not allowed to vote. The provisions in the New York State Constitution and the Election Law imposing literacy in the English language as a prerequisite for voting and barring from the ballot persons completely literate in another language should therefore be held unconstitutional and the decision of the court below should be reversed.

Respectfully submitted,

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